

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 10 2006

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

V.

NICK T. NGUYEN,

Defendant – Appellant,

No. 05-10576

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

D.C. No. CR-04-182-KJD

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Kent Dawson, District Judge, Presiding

Argued and Submitted June 12, 2006
San Francisco, California

Before: HUG and O'SCANNLAIN, Circuit Judges, and BENITEZ**, District
Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Roger T. Benitez, District Judge for the Southern District of California, sitting by designation.

Defendant Nick T. Nguyen, D.P.M. (“Nguyen” or “defendant”) appeals his conviction on 68 counts of health care fraud in violation of 18 U.S.C. § 1347.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court did not abuse its discretion in rejecting three areas of proposed expert testimony. The district court did not abuse its discretion in concluding that the proposed expert testimony regarding defendant’s character traits for honesty and truthfulness failed to meet the standards set out by Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). The psychologist did not administer tests for honesty, or otherwise use accepted principles and methods to arrive at his conclusion regarding defendant’s character. Defendant’s character for honesty and truthfulness is also not a proper subject for expert testimony, as this is an issue with which the average juror is familiar, and requires no assistance in comprehending. See United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); United States v. Rahm, 993 F.2d 1405, 1413 (9th Cir. 1993) (“[T]his circuit continues to guard . . . from expert elucidation, areas believed to be within the jurors’ common understanding.”).

The district court did not abuse its discretion in excluding the proposed testimony regarding defendant’s alleged “yea-saying” condition. The testimony was irrelevant under Fed. R. Evid. 402. Defendant worked for himself during the period at issue in the indictment, so any tendency to acquiesce to authority in how

he did his Medicare billing, has no bearing. See United States v. Scholl, 166 F.3d 964, 971 (9th Cir. 1999) (rejecting expert testimony on defendant's compulsive gambling because it lacked relevance to the crime of properly reporting wins and losses on his tax return).

The district court did not abuse its discretion in excluding the proposed expert testimony regarding the ability of the government's witnesses, patients of Nguyen, to perceive and recollect the podiatric treatment Nguyen administered. The expert did not examine any of these witnesses, but would have opined as to the effects of age, mental conditions and illnesses on the basis of their medical records. This type of testimony about the credibility of witnesses has consistently been excluded in the Ninth Circuit. See United States v. Rohrer, 708 F.2d 429, 434 (9th Cir. 1983) (finding proposed testimony regarding potential effects of drug usage on a witness properly excluded). See also United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985) (expert testimony on credibility of particular witnesses was improperly admitted because credibility is an area in which jurors do not need expert assistance); United States v. Bernard, 625 F.2d 854, 860 (9th Cir. 1980) (refusal to admit testimony by psychologist of hypothetical impairment of witness's memory and perception based on drug usage was not abuse of discretion); United States v. Barnard, 490 F.2d 907, 912-13 (9th Cir. 1973) (proper to exclude testimony by psychiatrist and psychologist as to witness's credibility

based on review of witness's psychiatric record and observation of witness in court because credibility is determination for the jury).

In addition to the proposed expert testimony, the district court excluded so-called "happy camper" testimony from patients of Nguyen who believed him to be an honest doctor and to have billed properly for their care. This case is indistinguishable from the recent decision in United States v. Ciccone, 219 F.3d 1078 (9th Cir. 2000). In Ciccone, the defense sought to introduce testimony from contributors to a fraudulent charity that they thought the charity was legitimate, and they liked the free gift they got. Ciccone attempted to introduce the testimony to negate the specific intent element of the crime, much as Nguyen does here. The court aptly noted that "where, as here, the proffered evidence relates not to the nature of the scheme or the defendant's intent, but rather to the uninformed opinion of the victims, it is not an abuse of discretion to exclude it." Id. at 1082-83. The "happy camper" testimony was irrelevant, and the district court did not abuse its discretion in excluding it.

Lastly, the district court did not err in refusing to consolidate the counts of the indictment. Each count of the indictment represented a separate execution of the fraud scheme. Each billing that defendant submitted to Medicare involved a separate and independent obligation to be truthful, and also separately and independently created a risk of loss to Medicare. See United States v. Hickman,

331 F.3d 439, 446-447 (5th Cir. 2003); United States v. Cooper, 283 F. Supp. 2d 1215, 1234 (D. Kan. 2003). Additionally, the indictment passes the Blockburger test because each count required proof of an additional fact not required to be proved in the others. Blockburger v. United States, 284 U.S. 299 (1932). It was therefore not multiplicitous.

AFFIRMED.